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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

No. 90-____

STATE OF MISSISSIPPI,

Petitioner,

v.

KEVIN LEWIS TURNER,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

COMES NOW, KEVIN L. TURNER, and respectfully files the following opposition to the State of Mississippi's *Petition for a Writ of Certiorari to the Supreme Court of Mississippi (hereinafter "Petition")*.

A. INTRODUCTION.

The Supreme Court of Mississippi affirmed Respondent's conviction for capital murder, but reversed his sentence of death. See Turner v. State, 573 So. 2d 657 (Miss. 1990). Respondent had been indicted as an habitual offender, meaning that if he were sentenced to life in prison he would have to serve life without possibility of parole. Id. at 674 n.6. The Court ruled that jurors, who often believe that "a life sentence means 'five or six' years" in prison, should be accurately instructed that Respondent would be ineligible for parole. Id. at 675.

Petitioner, the State of Mississippi, now seeks review by this

Court. There are a number of reasons why the petition for certiorari should not be granted.

B. THE REASONS WHY CERTIORARI SHOULD BE DENIED.

The decision below rests on not one, but three, adequate and independent state law grounds. In any event, the issue in this case does not merit certiorari review since there is no divergence of opinion in the lower courts.

I. THE DECISION BELOW IS PREDICATED ON ADEQUATE AND INDEPENDENT STATE COURT GROUNDS, SO THAT ANY GRANT OF CERTIORARI WOULD BE IMPROVIDENT.

There are two distinct species of "adequate and independent state law ground" -- one, where the judgment of the state court is actually predicated on state law, rather than the federal constitution. See, e.g., Michigan v. Long, 463 U.S. 1032, 1041-42, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983). Two, where there exist other reasons why the conviction or sentence were reversed, rendering the state court ruling on a particular issue unnecessary to the ultimate decision. See, e.g., Ohio v. Huertas, 498 U.S. ___, 111 S. Ct. ___, 112 L. Ed. 2d 837 (1991) (declining to review continuing viability of Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987)).

The presence of both of these "types" of independent ground in the decision below render the case an inappropriate subject for certiorari review.

A. The Supreme Court of Mississippi has ruled that the issue presented by Petitioner should be resolved on State Law grounds.

It is true that the lower court failed to make it clear in Turner whether the decision was predicated on state or federal grounds. However, in the subsequent decision of Mackbee v. State, ___ So. 2d ___, No. 03-DP-89 (Miss. Dec. 27, 1990) (not yet reported), the Mississippi Supreme Court clarified this ambiguity:

> We emphasize that we only refer to federal authorities for illustrative purposes. The conclusions that we reach are based on the State Constitution.

Id., slip Op. at 38 n.11 (citing Michigan v. Long, 463 U.S. 1032, 1042, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983)).

Petitioner properly notes as much in a footnote:

> We note that in Mackbee, the court below attempts to evade review of this claim by stating in a footnote 11 that the federal authorities cited in that case are for illustrative purposes only and that the case is decided under the State constitution.

Petition, at 13 n.2.

So far, so good. Petitioner continues, however, to argue that "[t]his statement in Mackbee has no application to the case at bar . . . [which] is clearly based solely on federal constitutional law." *Id., at 13 n.2.* This is not the law. As this Court explicitly stated in Michigan v. Long:

> The jurisdictional concern is that we not "render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

Id., 463 U.S. at 1042 (quoting Herb v. Pitcairn, 324 U.S. 117, 126, 65 S. Ct. 459, 89 L. Ed. 2d 789 (1945)).

In discussing whether a jury should be provided accurate information regarding probation or parole, this Court has held that "[i]t is elementary that States are free to provide greater protections in their criminal justice system that the Federal Constitution requires." California v. Ramos, 463 U.S. 992, 1013, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 (1983). Whatever the merits of the federal claim, the Mississippi Supreme Court has accepted this invitation to decide the case on state law grounds. Thus, no federal question is presented for review.

B. Since two distinct issues which were presented in this case required reversal of the death sentence, there probably exist other adequate grounds for this decision.

Two other issues were decided favorably to Respondent in the Mississippi Supreme Court. Either or both would, most likely,[1] result in reversal of the death sentence regardless of the disposition of the habitual offender issue. These issues are not, to be sure, as clear cut as the one already mentioned. However, "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not

[1] It should be noted that the court below divided the opinion up into four sections: Guilt Phase, Sentencing Phase, *Reversible Error*, and Recusal. Turner v. State, 573 So. 2d at 661, 667, 673 & 675 (emphasis supplied). However, the fact that these two issues were not included under the "Reversible Error" category does not exclude them from being "reversible," just as the failure to include the habitual offender instruction issue under the "Sentencing Phase" category does not exclude it from being a sentencing phase issue.

to pass on questions of constitutionality . . . unless such adjudication is unavoidable." Jean v. Nelson, 472 U.S. 846, 854, 105 S. Ct. 2992, 86 L. Ed. 2d 664 (1985) (quoting Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105, 65 S. Ct. 152, 89 L. Ed. 101 (1944)). If the ultimate outcome of the case would likely be settled on two other grounds, it makes little sense for this Court to grant certiorari to review a third.

(i) The Shell v. Mississippi Issue.

The jury was instructed pursuant to *Miss. Code Ann. § 99-19-101 (5) (h)*, which provides that one aggravating circumstance for the jury to consider may be whether the crime was "especially heinous, atrocious or cruel." Although a so-called "limiting instruction" was given, the Mississippi Supreme Court explicitly found that this was "'not constitutionally sufficient.'" Turner v. State, 573 So. 2d at 669 (quoting Shell v. Mississippi, 494 U.S. ___, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990)).

The Mississippi Supreme Court has not yet made clear whether this error will automatically result in a resentencing trial. See Clemons v. Mississippi, 494 U.S. ___, 110 S. Ct. ___, 108 L. Ed. 2d 725 (1990) (remanding for a determination whether, under state law, the court will conduct a reweighing of the evidence, excluding an invalid aggravating circumstance). Absent some ruling on this question, this Court's exercise of jurisdiction in this case may well prove to be futile.

(ii) The Prosecutor's Comment on Silence.

Expressing his remorse, Respondent took the stand at the

penalty phase, and admitted his involvement in the crime. In closing argument, the prosecutor emphasized to the jury:

> And you realize that he didn't take the stand until this stage.

Turner v. State, 573 So. 2d at 670. While the Mississippi Supreme Court did not expressly reverse on this point, the Court held that "[o]n retrial this comment should not be repeated." Id.

It hardly bears mention that the prosecution should make no comment on the defendant's failure to take the stand. See Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). The Supreme Court of Mississippi cited to Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981), where this Court held:

> We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment is concerned. Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees.

Id. at 462-63. Indeed, in State v. Hawkins, 357 S.E.2d 10 (S.C. 1987), the court rightly found that "[a]rguments of this nature are especially egregious in the context of death penalty [sentencing] proceedings because they violate the Eighth as well as the Fifth Amendment." Id. at 13 (emphasis supplied).

For this reason, lower courts which have considered an overt comment made at the penalty phase in denigration of the right to

remain silent have found a violation of the Fifth Amendment.[2] While not absolutely certain from the opinion below, this error would seem to vitiate the death sentence, either alone or in conjunction with the Shell error. Therefore, there is another independent reason why Respondent's sentence of death cannot stand.

II. THERE EXISTS NO CONFLICT IN THE CIRCUITS ON THIS ISSUE SUCH THAT CERTIORARI SHOULD BE GRANTED.

In an effort to fabricate a conflict in the lower courts, Petitioner cites O'Bryan v. Estelle, 714 F.2d 365 (5th Cir. 1983), cert. denied sub nom. O'Bryan v. McKaskle, 465 U.S. 1013, 104 S. Ct. 1015, 79 L. Ed. 2d 245 (1984), as the antithesis of the holding in Turner v. State. Under even passing scrutiny, it is apparent that the cases are not in conflict. In O'Bryan, the Texas trial court had instructed the jury in no uncertain terms not to take parole into consideration. Id. at 388 n.21. This was, perhaps, as much as the defense could have hoped for, since there was no allegation that the defendant would not have been eligible for parole at some speculative time in the future.

Under these circumstances, the Fifth Circuit held that there was no need for an instruction "about the law governing the Board of Pardons and Paroles in relation to inmates sentenced to life

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[2] See, e.g., State v. Cockerham, 365 S.E.2d 22, 23 (S.C. 1988); State v. Arthur, 350 S.E.2d 187, 191 (S.C. 1986); State v. Brown, 347 S.E.2d 882, 887 (S.C. 1986); People v. Ramirez, 98 Ill. 2d 439, 75 Ill. Dec. 241, 457 N.E.2d 31, 35-37 (1983); People v. Szabo, 94 Ill. 2d 327, 68 Ill. Dec. 935, 447 N.E.2d 193, 209 (1983); Williams v. State, 445 So. 2d 798, 813-14 (Miss. 1984); Bushnell v. State, 637 P.2d 529, 531 (Nev. 1982); State v. Sloan, 298 S.E.2d 92, 95 (S.C. 1982).

imprisonment. . . ." Id. at 388. If an accurate instruction had told the jury that the defendant would be eligible for parole at some future date, the instruction would not have done the defense much of a favor. To the contrary, it is clear that the defendant would benefit from an accurate, categorical statement that he will never be considered for pardon or parole.

In the other case cited by Petitioner, the *en banc* Fifth Circuit found itself procedurally barred from considering the issue presented in O'Bryan. See King v. Lynaugh, 850 F.2d 1055, 1056 n.1 (5th Cir. 1988) (en banc), cert. denied, 488 U.S. 1019, 109 S. Ct. 1564, 102 L. Ed. 2d 809 (1989). Thus, the Fifth Circuit has not been asked to consider the issue presented in this case. Before taking the question on certiorari, this Court should wait to see if a *bona fide* conflict ever actually arises, rather than accept the chimerical "conflict" offered by Petitioner.

To be sure, a conflict between the federal courts of appeal and the state high courts may occasionally provide the basis for certiorari jurisdiction. See, e.g., Lakeside v. Oregon, 435 U.S. 333, 336 n.3, 98 S. Ct. 1091, 55 L. Ed. 2d 319 (1978) (decisions of three circuits in conflict with decisions of two circuits and four state courts). However, this Court does not have the time or the resources merely to mollify dissatisfied litigants who feel -- perhaps wrongly -- that a state court erroneously decided an issue. Rather, certiorari must be reserved for the "conflict[] among jurisdictions over an issue which 'imperatively demand[s] a single uniform rule [and therefore] commands this Court's immediate

attention." Brown Transportation Corp. v. Atcon, 439 U.S. 1014, 99 S. Ct. 626, 58 L. Ed. 2d 687 (1978) (citation omitted; emphasis supplied) (White & Blakmun, JJ., dissenting from denial of certiorari).

CONCLUSION

Wherefore, Mr. Turner respectfully suggests that it would be improvident to grant certiorari in this case.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing document was mailed this day to Marvin L. White, Jr., Assistant Attorney General, P.O. Box 220, Jackson, Miss. 39205.

This the 3rd day of April, 1991.

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3rd April, 1991

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90-1446

Re: Mississippi v. Turner, No. 90-____.

Dear Sir/Madam:

Please find enclosed the original and nine (9) copies of Mr. Turner's Opposition to Petition for Writ of Certiorari to the Supreme Court of Mississippi, and his Motion for Leave to Proceed In Forma Pauperis.

I remain,

Yours sincerely,

Clive A. Stafford Smith

Enclosures

Supreme Court of the United States

No. 90-1446

Mississippi,

Petitioner

v.

Kevin Lewis Turner

ON CONSIDERATION of the motion of respondent for leave to proceed in forma pauperis,

IT IS ORDERED by this Court that the said motion, be, and the same is hereby, granted.

April 29, 1991

Supreme Court of the United States

No. 90-1446

Mississippi,

Petitioner

v.

Kevin Lewis Turner

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Mississippi, No. 03-DP-0082.

ON CONSIDERATION of the petition for a writ of certiorari herein to the Supreme Court of Mississippi.

IT IS ORDERED by this Court that the said petition be, and the same is hereby, denied.

April 29, 1991

A true copy WILLIAM K. SUTER
Test:
Clerk of the Supreme Court of the United States
By _____
Deputy